Bank Negara Malaysia v Co-Operative Central Bank Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8–25–12–89
ABU MANSOR J
2 SEPTEMBER 1993

Receivers *— Discharge — Locus standi — Application for discharge by Bank Negara — Whether receivers had locus standi to appear in hearing of application*

Receivers *— Discharge — Indemnity — Court's discretion — Whether receivers entitled to indemnity for acts done as receivers and managers — Whether new receivers appointed should bear liability for previous receivers' acts — Application of common law principles*

Receivers *— Discharge — Considerations to be taken into account — Savings in management costs*

Receivers *— Discharge — Indemnity — Costs — To be provided from assets of bank in receivership*

Receivers *— Discharge — Costs of proceedings — Costs to be borne by Bank Negara as it was necessary for parties to be heard*

By an order of the High Court made pursuant to the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'), Messrs Hanafiah Razlan Mohamed & Co Insolvency Services were appointed receivers and managers ('the receivers') of the Co-Operative Central Bank Ltd ('CCB'). Bank Negara ('the applicant') sought an order, inter alia, that the receivers be discharged as the receivers and managers of CCB, on the ground that there would be considerable savings in the management costs of CCB if the services of the receivers were discharged. The receivers sought a suitable provision in the order that they be indemnified against all liabilities that may be incurred by them in the discharge of their duties as receivers and managers. The issues before the court were: (i) had the receivers the locus standi to appear at the hearing of the application for their discharge; and (ii) could and should the court grant the receivers an indemnity against all liabilities, present and future, found to be properly incurred, in the order for their discharge.

Held, allowing the applicant's application for discharge of the receivers and granting an indemnity to the receivers:

(1) The receivers had locus standi to appear in the application for their discharge as they had been made parties to the proceedings and served with the application.

(2) As there would be a considerable savings in the cost of management of CCB if the receivers were discharged, the court would exercise its discretion to have the receivers discharged.

(3) It was only right that the receivers be placed in the proper position where they stood in the discharge of their duties at the relevant time, as their course of action was correct and clearly for the benefit of CCB. The applicant could not be allowed to have the benefit of the receivers' duties without having the burden, and the applicant, or its appointee under reg 9(1)(b) of the Regulations, should be made to shoulder the obligations. In this case, the appointees of the applicant should be substituted for any liabilities, present and future, found to be properly incurred by the receivers.
(4) The court acknowledged that indemnity was to be given to the receivers, and that such indemnity was to be from the assets of CCB.
(5) The costs of the proceedings were to be borne by the applicant as it was necessary for the receivers and managers and others to be heard.

[Bahasa Malaysia summary

Melalui suatu perintah Mahkamah Tinggi yang dibuat di bawah Essential (Protection of Depositors) Regulations 1986 ('Peraturan itu'), Tetuan Hanafiah Raslan Mohammed & Co Insolvency Services telah dilantik sebagai penerima dan pengurus ('penerima') Co-Operative Central Bank Ltd ('CCB'). Bank Negara ('pemohon') telah memohon perintah, antara lain, bahawa penerima dilepaskan sebagai penerima dan pengurus CCB, atas dasar bahawa akan terdapat penjimatan kos pengurusan CCB jika perkhidmatan penerima ditamatkan. Penerima memohon untuk suatu peruntukan yang sesuai dalam perintah tersebut supaya diberikan indemniti terhadap semua liabiliti yang mungkin ditanggung dalam melaksanakan tugas mereka sebagai penerima dan pengurus. Isu di hadapan mahkamah ialah: (i) sama ada penerima mempunyai locus standi untuk menghadiri pendengaran permohonan untuk pelepasan mereka; dan (ii) sama ada mahkamah boleh dan harus memberikan indemniti kepada penerima terhadap semua liabiliti, pada masa kini dan akan datang, yang ditanggung dengan betul, dalam perintah untuk pelepasan mereka.

Diputuskan, membenarkan permohonan pemohon untuk melepaskan penerima dan memberikan indemniti kepada penerima:
(1) Penerima mempunyai locus standi untuk menghadirkan diri di permohonan untuk pelepasan mereka kerana mereka telah dijadikan pihak kepada prosiding itu dan telah disampaikan dengan permohonan itu.
(2) Oleh kerana terdapat penjimatan yang besar dalam kos pengurusan CCB jika penerima dilepaskan, mahkamah akan menggunakan budi bicaranya untuk melepaskan penerima.
(3) Adalah wajar supaya penerima diletakkan dalam kedudukan betul dalam pelaksanaan tugas mereka pada masa yang relevan, memandangkan bahawa tindakan mereka adalah betul dan jelas untuk kebaikan CCB. Pemohon tidak boleh dibenarkan mendapat faedah tugas penerima tanpa menanggung bebannya. Oleh itu,

pemohon, atau pihak yang dilantik olehnya di bawah peraturan 9(1)(b) Peraturan itu, patut menanggung obligasi itu. Dalam kes ini, pihak yang dilantik oleh pemohon patut digantikan untuk menanggung liabiliti, pada masa kini dan akan datang, yang ditanggung dengan betul oleh penerima.

(4) Mahkamah mengakui bahawa indemniti harus diberikan kepada penerima dan bahawa indemniti itu harus datang daripada aset CCB.

(5) Kos prosiding ditanggung oleh pemohon kerana penerima dan pihak-pihak lain perlu didengar.]

Dato' Zaki Tun Azmi (*Benjamin Yean* and *S Thomas* with him) (*Rashid & Lee*) for the applicant.

N Chandran (*P Jayasingam* with him) (*Adnan Sundra & Low*) for the receivers and managers.

Abu Mansor J: In this notice of motion, encl 6, dated 8 April 1992, the applicant [Bank Negara Malaysia ('Bank Negara')] applied for the following orders:

(1) that Tuan Haji Zainal Abidin Putih (NRIC No 0496961) and Tuan Haji Ahmad Kamal bin Abdullah Al-Yafii (NRIC No 0756776) of Messrs Hanafiah Raslan Mohammed & Co Insolvency Services, Level 5, Block C (South) Pusat Bandar Damansara, Damansara Heights, PO Box 11040, 50734 Kuala Lumpur, the receivers appointed by the court on 7 March 1989 to manage the affairs and properties of the Co-Operative Central Bank Ltd ('CCB') be discharged with effect from the date of the order of court granting such discharge;

(2) the said receivers do surrender and deliver into the possession of Bank Negara or the persons appointed by it under reg 9(1)(b) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'), all books, documents, accounts, properties and moneys of CCB or which relate to the affairs and business of CCB, as are in the possession of the receivers or are under their custody or control;

(3) the said receivers do furnish to Bank Negara, or to persons appointed by it under reg 9(1)(b) from time to time, such information and clarification in relation to the period during which the receivers were in office, where such information and clarification is required by Bank Negara or the persons so appointed, for the purpose of assuming control and carrying on the business of CCB;

(4) the said receivers do complete and file with this court the final accounts of CCB in respect of the period during which they were receivers of CCB, and that such accounts be filed within 30 days of their discharge taking effect, or such longer period as this court may allow;

(5) the applicant's costs in respect of this application and incidental thereto shall be paid out of the assets of CCB;

(6) the applicant be at liberty to file afresh; and

(7) all other relief that the court deems fit and just.

The issue before this court is an application for discharge of receivers and managers and if the court is so minded to give the order, could the court

give the indemnity in the sum prayed for? The counsel for the receivers and managers, Mr Chandran, contends that there is nothing in the Regulations or the amended regulations dealing with this matter and, therefore, common law principles and common law decisions can be applied.

This raises the question of the locus standi of the receivers and managers to appear before me in these proceedings, and the submission of learned counsel for the applicant, Bank Negara, YB Dato' Zaki Tun Azmi is to the effect that they have not, and that if they do appear, then costs must be on them. I uphold the submission of Mr Chandran that they had been made parties and they had been duly served, I am unable to say that they have no locus standi. I say they have locus standi to appear in this application.

Should this court grant the application of the applicant, Bank Negara? If so, should the discharge be with the provision of the immunity in the sum prayed for? It is common ground that it is in the discretion of this court whether these appointed receivers and managers should be discharged. It is also common ground that there is no real objection that they should not be discharged in the circumstances of the facts of this case.

One very good reason why I should grant the discharge is the considerable savings in the cost of management, if the services of the receivers and managers are discharged. The intention of the government in bringing the Regulations is clear that the CCB must be nurtured to health and the depositors' welfare taken into account. This consideration alone is sufficient and that this court will and hereby exercise its discretion to have the receivers and managers discharged. The remaining issue is should the discharge be with indemnity granted in the sum prayed for. The onus here is for the receivers to say so.

As has been stated by Mr Chandran, the receivers and managers have absolutely no objection to the applicant's application but what they would ask for is that this court makes a suitable provision in the order of discharge for them to be indemnified and kept indemnified in all the works carried out by them in and about the discharge of their duties as such receivers and managers.

What is the law? Mr Chandran has taken us through the numerous decided cases and I do apply them that the receivers and managers are entitled to be indemnified and they are to be so indemnified out of the assets of CCB. Everyone of the authorities seem to agree on this.

However, what the receivers want in the prayers asked for under (a) to (d), is to get the court to provide expressly in the order for discharge, a consequential order that the receivers and managers be indemnified and kept indemnified in the sum prayed for against any liabilities that they may have to answer (excluding liabilities for any negligence on their part) in the discharge of their duties.

If I understand the counsel for the receivers and the managers' submission, they need this consequential order because there are present pending claims involving personal liability of the receivers and managers almost acknowledged by the applicant in encl 6A and, in particular, paras 22 and 24. The receivers and managers say that since the stand of the applicant is not clear, it is not sufficient that, in the required discharge, the applicant merely says that the discharge will not affect their being parties to the

proceedings in their individual capacities. Since this is the stand taken by the applicant, this necessitated the receivers and managers seeking the order they are seeking, as they say they are entitled to look to the assets of CCB. The applicant's submission is that the receivers and managers' right of indemnity against assets of CCB can only be in regard to liabilities properly incurred in the course of their duties as receivers and managers.

After having considered carefully the position of the receivers and managers, the court could understand the anxiety felt by them and it is only right that they be placed in the proper position where they stood in the discharge of their duties at the relevant time.

The termination of the services of the ex-employees was done clearly for the benefit of CCB and rightly should have been done at that relevant time, bearing in mind the state of financial position of CCB. As for their authority to do so, they were given express power to so terminate the services of the employees, in circumstances deemed necessary by reason of saving costs and in order to nurture to health that organization. The court accepts this clear reason for their so acting. The applicant, Bank Negara, cannot of course, be allowed to have to have the benefit of their duties without wanting to shoulder the burden arising from their correct course of action of cost-saving considerations.

Understanding the position of the receivers and managers and the law involved, the court feel that it is fair that the applicant, having had the benefit of good services of the receivers and managers, should be clearly made to shoulder the obligations, either on itself or, I am more minded, correctly, it should be the CCB and, in this regard, I have considered the receivers and managers' alternative application in encl 2 para 22 where the receivers and managers are seeking an express order in the alternative that Bank Negara's appointees be substituted in their place for any liabilities, present and future, and an order be made for such substitution. I have considered this order I would make to be most fair, in my view, since it is only right that the new receivers and managers should continue to be liable for the acts and duties of their predecessors in claims against the assets of CCB.

I therefore grant the discharge in the term of the orders prayed for by the applicant in encl 6. I refuse the receivers and managers' application in the form asked for in encl 11 para 39 and, in its place, I make an alternative order prayed for in encl 20 para 22, that the new appointees be substituted for any liabilities, present and future, found to be properly incurred by the present receivers and managers. In giving this order prayed for, the court merely acknowledges that indemnity is given to the present receivers and managers and it is to be from the assets of CCB.

In respect of encl 19 para 11, the accounts prayed for are to be filed within 90 days and to be served on all parties concerned.

As for costs, the costs of this proceeding it is to be borne by the applicant as I find it was necessary for the present receivers and managers and others to be heard.

Order accordingly.

Reported by Wong Kim Fatt